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The Commonwealth of Massachusetts

SUPREME JUDICIAL COURT

FOR SUFFOLK COUNTY

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December 27, 2018

Superior Court
Barnstable, ss

Filed JAN 02 2018

CASE INFORMATION
FACSIMILE (517) 557-1068 Clerk

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Barnstable District Court Dept.
Clerk for Criminal Business
Court House - Main Street
Barnstable, MA 02630

RE: No. SJ-2018-0302

COMMONWEALTH

v.

EMORY SNELL

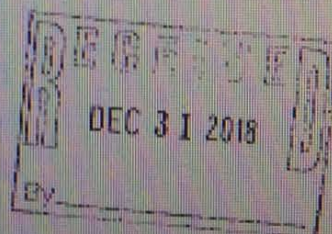
Barnstable Superior Court
No. 1995CR46579

NOTICE OF DOCKET ENTRY

You are hereby notified that on December 27, 2018, the
following was entered on the docket of the above referenced case:
Memorandum of Decision & Judg., as on file. Lowy, J.

Maura S. Doyle, Clerk

To: Elizabeth Anne Sweeney, Assistant District Attorney
Richard J. Shea, Esquire
Barnstable District Court Dept.



COMMONWEALTH OF MASSACHUSETTS

Filed JAN 02 2018

Superior Court
Barnstable, ss

Scott W. Kildam
Clerk

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

NO. SJ-2018-0302

COMMONWEALTH vs. EMORY G. SNELL, JR.

MEMORANDUM OF DECISION AND JUDGMENT

Emory G. Snell, Jr., was tried and convicted of murder in the first degree. After plenary review pursuant to G. L. c. 278, § 33E, the court affirmed his conviction and the denial of his first motion for a new trial. See Commonwealth v. Snell, 428 Mass. 766 (1999). Thereafter, Snell filed multiple motions in the Superior Court seeking postconviction relief. In 2017, he filed his third motion for a new trial and, citing Mass. R. Crim. P. 30 (c) (4), moved for discovery of the personnel file of a medical examiner, William Zane, M.D.,¹ who was formerly employed by the Office of the Chief Medical Examiner. After a hearing, the Superior Court judge ordered certain records be produced to the Superior Court Clerk's office. The Commonwealth filed a petition pursuant to G. L. c. 211, § 3, seeking review of and relief from

¹ Snell also sought discovery of other documents associated with the Office of Chief Medical Examiner. The Commonwealth's petition does not make a specific argument concerning that request.

the "order of disclosure of the personnel file."² It contends that the information was outside the custody or control of the district attorney, and includes potentially privileged information that was not part of the trial proceedings.

The G. L. c. 211, § 3, petition is denied because the Commonwealth has an adequate alternative remedy, specifically, a gatekeeper petition under G. L. c. 278, § 33E. It is well established that, after the court's rescript in a capital case, the gatekeeper provision applies when either the Commonwealth or the defendant seeks review of a ruling on a postconviction motion. See, e.g., Commonwealth v. Gilbert, 447 Mass. 161, 164-165 (2006); Commonwealth v. Francis, 411 Mass. 579, 580 (1992). "That provision expressly prohibits an appeal from 'any motion' filed in the Superior Court after § 33E review" unless a single justice of this court determines that a "new and substantial question which ought to be determined by the full court," is present and authorizes the appeal. G. L. c. 278, § 33E. See Commonwealth v. Davis, 410 Mass. 680 (1991) (gatekeeper requirement applied to denial of motion for costs). The court's extraordinary power of superintendence under G. L. c. 211, § 3, does not provide an alternative or substitute remedial route. See, e.g., Allen v. Commonwealth, 446 Mass. 1008, 1008 (2006), quoting Lykus v. Commonwealth, 432 Mass. 160, 162 (2000).

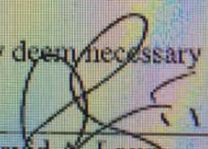
The Commonwealth may, of course, file a gatekeeper petition pursuant to G. L. c. 278, § 33E, seeking leave to appeal the discovery order to the full court, and addressing the statutory considerations relevant to such an appeal. Without deciding the point, because the defendant seeks postconviction discovery pursuant to Mass. R. Crim. P. 30 (c) (4), and the materials

² In a single sentence in its supplemental memorandum, the Commonwealth asks to amend its petition under G. L. c. 211, § 3, requesting for the first time that the petition be considered as a gatekeeper petition, under G. L. c. 278, § 33E. That request is denied without prejudice. The Commonwealth may file a gatekeeper petition, if it chooses to do so, within thirty days of this order.

requested include records of a third party, the parties may wish to consider whether (in addition to satisfying the requirements of Mass. R. Crim. P. 30) such records may be obtained without a judicial order authorizing the issuance of a summons, see Mass. R. Crim. P. 17 (a) (2), and compliance with protocols that accompany rule 17, or substantially similar procedures. See Commonwealth v. Odgren, 455 Mass. 171, 182 & n.21 (2009) (referencing use of Fed. R. Crim. P. 17 to obtain evidence for use in post-trial proceedings); Commonwealth v. Torres, 479 Mass. 641 (2018) (outlining Lampron-Dwyer protocol), and cases cited. See also United States v. Winner, 641 F.3d 825 (10th Cir. 1981) (while Fed. R. Crim. P. 17 subpoenas generally used pretrial, "we see no reason why their use should not be available for post-trial motions and sentencing"); 2 C.A. Wright, A.D. Leipold, P.J. Henning, & S.N. Welling, Fed. Prac. & Proc. Crim. § 272 (4th ed. 2018), citing Winner, *supra*. They may also wish to consider whether further proceedings in the Superior Court are warranted.

ORDER

It is ORDERED that the Commonwealth's petition, pursuant to G. L. c. 211, § 3, is denied. The Commonwealth is granted leave to file a gatekeeper petition, pursuant to G. L. c. 278, § 33E. This court's order, dated July 16, 2018, staying the Superior Court's order requiring production of certain records of the Office of the Chief Medical Examiner, shall continue for a period of thirty additional days. During that period, the parties may pursue any further proceedings in the Superior Court or this court, as they deem necessary or appropriate.



David A. Lowy
Associate Justice

December 27, 2018